No. 80-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF GALLUP,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT PUBLIC SERVICE COMPANY OF NEW MEXICO IN OPPOSITION

PAUL H. KECK
MICHAEL F. HEALY
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

Counsel for Public Service Company of New Mexico

WILLIAM B. KELEHER
RICHARD B. COLE
Keleher & McLeod, P.A.
900 Public Service Building
Albuquerque, New Mexico 87103

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit properly determined that the interpretation by the Federal Power Commission and the Federal Energy Regulatory Commission of the intent of the parties to a contract was factually and legally supported.

PARTIES TO THE PROCEEDINGS BELOW

City of Gallup, New Mexico
Federal Energy Regulatory Commission
Public Service Company of New Mexico

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OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISIONS

The Opinions Below, Jurisdiction and Statutory Provisions requisites are adequately set forth in the petition for a writ of certiorari ("Petition").

STATEMENT OF THE CASE

On April 21, 1975, Public Service Company of New Mexico ("PNM") filed with the Federal Power Commission ("FPC" or "the Commission")[1] a proposed rate schedule supplement with respect to the City of Gallup ("Gallup") pursuant to § 205 of the Federal Power Act, 16 U.S.C § 824d (1970). Gallup objected and the FPC held, in an "Order Denying Motion to Reject, Instituting Section 206(a) Proceeding, Granting Interventions, And Establishing Dates," Docket No. E-9454, that the existing contract did not permit a unilateral rate change, and that the FPC would have to determine a just and reasonable rate in an adjudicatory proceeding as provided by § 206 of the Act, 16 U.S.C. § 824e. Appendix to Petition ("App.") 45. The FPC also held, however, that "the procedures under such a Section 206(a) proceeding would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions." App. 49 n.5.[2]

Both PNM and Gallup petitioned for review. In PNM's appeal, the United States Court of Appeals for the Tenth Circuit affirmed the FPC, stating with regard to the language of the contract between PNM and Gallup that "the reference therein to changes ordered by a regulatory body ... points toward a change after a § 206 proceeding, not a § 205 unilateral filing." *Public Service Co. of New Mexico v. FPC*, 557 F.2d 227, 232 (1977). In that opinion, the Tenth Circuit also

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[1]The term "Commission" shall also be used to refer to the FPC's successor — the Federal Energy Regulatory Commission ("FERC").

[2]United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956), and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

dismissed, as prematurely brought, Gallup's petition for review with respect to the burden of proof which the FPC had decided PNM should carry in the § 206 proceedings to be held.

While the matter was pending before the Court of Appeals, the Commission commenced the § 206 proceeding to determine the just and reasonable rate. The Staff submitted cost of service evidence which justified a revenue increase of $615,000 and Gallup filed testimony showing a cost of service calling for an increase of $544,000. PNM Appendix ("PNM App.") 2. In order to obtain at least some relief on an expeditious basis, PNM accepted the increase shown by Gallup, and formally submitted an offer of settlement, which Staff accepted. *Id.*

Despite the fact that the settlement was based on Gallup's own figures, Gallup objected to the settlement on the ground that there were factual issues outstanding which barred acceptance of the settlement. By order dated September 8, 1976, the Commission rejected the proposed settlement, stating that it was "unable to accept all of Gallup's factual allegations and still approve the settlement rates as just and reasonable on this record." PNM App. 3-4.

Additional hearings were held and it was not until October 20, 1977 that the Administrative Law Judge's Initial Decision on Application for Rate Increase was entered. On July 5, 1978, the Commission affirmed the Initial Decision of the Administrative Law Judge and approved PNM's revised rate schedule. On December

15, 1978, the Commission entered an Order denying both Gallup's and PNM's requests for rehearing.[3] Gallup thereupon filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit on December 18, 1978, No. 79-1274, and on motion by the Commission, that Court transferred the matter to the Tenth Circuit on March 28, 1979.

The second petition for review filed by Gallup, No. 79-1275, arose from other FERC orders relating to an additional rate change request which PNM filed with the Commission on April 21, 1978 in Docket No. ER 78-338. That rate proposal was pursuant to the same contract between PNM and Gallup which was interpreted by the FPC in Docket No. E-9454 and by the Tenth Circuit in 1977 in *Public Service Co. of New Mexico v. FPC, supra*. On June 30, 1978, FERC entered an Order which, *inter alia*, directed, as had the FPC in its July 1975 Order, institution of proceedings to determine a just and reasonable rate. Gallup once again petitioned for rehearing, contending that the decision of the FPC as to the burden of proof PNM must satisfy should not be followed because there was now new material before the Commission. On December 15, 1978, FERC issued an "Order on Rehearing Denying Requested Relief" to Gallup, and expressly approved the FPC's 1975 interpretation of the contract. The Commission explained that:

> the parties did not intend to allow a change in rates by unilateral filings under Section 205, but

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[3]PNM sought rehearing on the ground that the Commission's decision that PNM was required to file the coal contract between it and Western Coal Company with the Commission was erroneous. PNM filed a Petition for Review with the Tenth Circuit and in another part of the opinion, not now before this Court, the Tenth Circuit set aside those parts of the FERC's Orders which directed PNM to file the contract.

> only by "order" of the Commission, i.e., a change in rates prospectively after a Section 206(a) proceeding. Since the parties have prescribed a method for changing the rates there would be no need for the Commission to act under the overriding public interest standard enunciated in *Sierra* which only applies where the parties do not provide for any change in rates. Therefore, the *Sierra-Mobile* burden of proof does not apply to these proceedings. Gallup's petition for rehearing shall be denied. App. 44 (footnote omitted).

Gallup also sought review of this determination from the D.C. Circuit, but that petition was similarly transferred to the Tenth Circuit.

In its opinion affirming the Commission's interpretation of the terms of the contract between Gallup and PNM, the Court of Appeals found the Commission's determination that the contract was not a "fixed rate" contract to be reasonable. The Commission's determination was buttressed by the decision of the Fifth Circuit in *Louisiana Power & Light Co.* v. *FERC*, 587 F.2d 671 (1979) which examined similar language and also reached the conclusion that a fixed rate contract was not involved.

REASONS FOR DENYING THE WRIT

I. The sole issue presented by the Petition is the correctness of the Commission's interpretation of the intent of the parties to a contract.

The issue in this case is one of interpretation of the parties' intent in a contract — whether PNM and Gallup, in providing that rate changes would be accomplished

through a § 206 proceeding,[4] also contemplated that the § 206 "just and reasonable" standard would apply. Gallup contends that the *Sierra* burden of proof should apply rather than the "just and reasonable" standard on the ground that the instant contract is of the fixed rate type. Gallup argues that the Commission and the Tenth Circuit "have assumed away the very issue presented by this petition: whether the Commission may ever raise rates above those fixed by contract without first making the finding required by *Sierra*." Petition at 12. However, it is Gallup which has assumed the response to the threshhold issue — whether the parties intended the contract involved to be a single fixed rate contract. Only if the parties so intended does *Sierra* even apply. The Commission found to the contrary that the contract was not of the fixed rate variety and the Tenth Circuit affirmed.

The fundamentally factual question of the intent of the parties to a contract is one upon which the Commission is entitled substantial deference and one which does not merit review by this Court. The courts have held that:

> [a]lthough application of the *Mobile-Sierra-Memphis* principles to a given contract is primarily a matter of law, where the decision involves the interpretation of the parties' intent as revealed in the language of a contract, it is proper to defer to the Commission's expertise if its decision is "amply supported both factually and legally."

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[4]In its 1977 decision involving the same contract, the Tenth Circuit held that the provisions of the contract pointed "toward a change after a § 206 proceeding." Public Service Co. of New Mexico v. FPC, 557 F.2d 227, 232.

Gulf States Utilities Co. v. FPC, 518 F.2d 450, 457 (D.C. Cir. 1975), *quoting, United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958).

In addition, it is for the Court of Appeals and not for this Court to determine whether the Commission's decision is "amply supported." As the Court said in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951):

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

The instant case does not present such a "rare instance when the standard appears to have been misapprehended . . . ." Indeed, as illustrated below and in II *infra*, the Tenth Circuit's decision is consistent with the Court's *Sierra* decision and with the decisions of all other Circuits. Accordingly, there is no issue that merits review by this Court.

Gallup's contention that the contract in question is of the "fixed rate" type to which the *Sierra* burden of proof applies is premised upon the fundamentally unsound argument that "[b]y its terms, the *Sierra* decision applies to all contracts not unilaterally modifiable by a utility under Section 205 procedures." Petition at 14. The Commission and the Courts of Appeals have recognized that the two possibilities represented by the *Sierra-Mobile* and *Memphis* cases do not exhaust the range of agreements with respect to rate changes which parties could reach.

In *Sierra* and *Mobile*, the Court rejected the argument that the provisions of the Natural Gas Act and Federal Power Act provided a basis for one party to a contract unilaterally to change the terms of the contract. *E.g.*, 350 U.S. at 344. The Court agreed, however, that the Natural Gas Act and the Federal Power Act did vest in the Commission the power to change contract rates if the public interest so required. The statutory goal is not to permit a party to elude the effects of a poor bargain, but to protect the public interest by keeping the utility operating. Naturally, the Court held that such intervention to alter the terms of the parties' contract is appropriate only under exigent circumstances.[5] The other end of the spectrum from *Sierra* is exemplified by the Court's decision in *United States Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958). If the parties have in fact agreed to a unilateral increase in rates, their bargain will likewise not be subject to interference.

The principles established by this Court in the *Mobile*, *Sierra* and *Memphis* cases have been expressed as follows:

> The rule of *Sierra*, *Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing.

Richmond Power & Light Co. v. FPC, 481 F.2d 490, 493 (D.C. Cir.), *cert. denied, sub nom., Indiana & Mich. Elec. Co. v. Anderson Power & Light Co.*, 414 U.S. 1068 (1973).

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[5]Examples of the type of circumstances justifying relief cited by the *Sierra* Court were when the rate is so low "as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." 350 U.S. at 355.

> The Supreme Court's decisions in *Mobile* and *Sierra* establish beyond peradventure that efforts to alter rates are governed by the parties' contracts, subject only to the overriding power of the Commission to readjust contract rates in the public interest.

Kaukauna v. FERC, 581 F.2d 993, 996 (D.C. Cir. 1978) (footnotes omitted).

The same courts which have emphasized the *Sierra* principle that the terms of the contract must control the validity of any rate change have also expressly rejected Gallup's contention that the *Sierra* burden applies to any contract not unilaterally modifiable. The court in *Richmond Power & Light Co. v. FPC* stated that the parties, consistent with the *Mobile-Sierra-Memphis* doctrine, may "agree to a specific rate or . . . to a rate changeable in a specific manner." 481 F.2d at 497. With respect to contracts which can be changed in a specified manner, the court stated:

> We see no reason why the integrity of this contractual undertaking is any less deserving of protection under the Act than one for a single fixed rate. 481 F.2d 490, 497.

In *Kaukauna* v. *FERC,* 581 F.2d at 996, the court stated, citing *Richmond,* that:

> And as we ourselves have held, the parties may extend the protection of the contract to the mechanics of rate change as well as to the permissibility of any change at all.

In the instant case, the Commission found that the contract was not one establishing a fixed rate, but was instead one which, as the court in *Richmond* put it, is "changeable in a specific manner," and therefore does not require application of the *Sierra* burden of proof. The FERC interpreted the intent of the parties in the instant case as being that:

> the parties did not intend to allow a change in rates by unilateral filings under Section 205, but only by "order" of the Commission, i.e., a change in rates prospectively after a Section 206(a) proceeding. Since the parties have prescribed a method for changing the rates there would be no need for the Commission to act under the overriding public interest standard enunciated in *Sierra* which only applies where the parties do not provide for any change in rates. Therefore, the *Sierra-Mobile* burden of proof does not apply to these proceedings. App. 44 (footnote omitted).

This construction is consistent with the Commission's interpretation of similar language in other cases. In *Central Kansas Power Co.*, 52 FPC 933, 934-935 (1974), the Commission stated:

> A prerequisite to imposition of the *Sierra* burden, however, is a finding by the Commission that an applicant's rate filing is in contravention of the contractual provisions under which service is being rendered. Such a finding cannot be made in this case, for both parties agreed that the rate might be increased

> or decreased "by any regulatory body having jurisdiction with respect thereto." By including this provision, the parties were agreeing that the contract could be changed prospectively after a proceeding similar to a proceeding under Section 206 of the Federal Power Act. Our institution of a Section 206 investigation is, therefore, entirely consistent with the contractual provisions for which the parties have bargained.[6]

In affirming the Commission's interpretation of the contract, the Tenth Circuit also looked to the Fifth Circuit's decision in *Louisiana Power & Light Co.* v. *FERC*, 587 F.2d 671 (1979).[7] The Fifth Circuit affirmed the Commission's conclusions that what the parties had

> "bargained for and obtained [was] a contractual authorization for a section 206(a) proceeding with its just and reasonable standard of proof."
>
> In reaching that conclusion, the Commission gave a sensible, practical construction to the

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[6]*Accord*, Missouri Power & Light Co., No. ER 76-539 (Opinion No. 31-A, May 16, 1979); Indiana & Michigan Elec. Co., 52 FPC 259, 262 (1974), *aff'd*, Indiana & Michigan Elec. Co. v. FPC, 530 F.2d 1060 (D.C. Cir. 1976); Southern California Edison Co., 53 FPC 921, 922 n.1 (1975), *aff'd without opinion*, Southern California Edison Co. v. FPC, 535 F.2d 1325 (D.C. Cir. 1976).

[7]The Louisiana Power & Light contract referred to rate changes "in accordance with a valid applicable order of any governmental regulatory authority having jurisdiction hereof." Louisiana Power & Light Co. v. FERC, 587 F.2d at 676. The PNM-Gallup contract referred to changes "by any legally constituted regulatory body having jurisdiction to require such changes." Public Service Co. of New Mexico v. FPC, 557 F.2d at 231 n.10.

> contract language in dispute. This interpretation recognizes the likelihood that the parties negotiated a compromise between the *Sierra-Mobile* fixed rate contract, favorable to the customer, and the type of agreement involved in *Memphis,* which allows the utility to take unilateral action to increase charges. Under such an arrangement, a change in rates is not precluded, but "the manner in which such a change may be effected is contractually established," Commission Order, September 30, 1977; contracting for a section 206(a) proceeding preserves the utility's right to seek new rates, while assuring the customer that any increase requires Commission approval and can only take effect prospectively. *Id.* at 676.

The Tenth Circuit also emphasized that the Commission's interpretation of the instant contract was reasonable because the PNM-Gallup contract contained the additional provision in Article II permitting Gallup the option to terminate the agreement within 90 days should the rates "be increased 'for any reason whatsoever' . . . ." *Public Service Co. of New Mexico* v. *FERC,* 628 F.2d at 1270. Such a system for changes in rates is reasonable, and a contrary construction that a contract is of the fixed rate type is unreasonable when the term of the contract is for as long a period (25 years) as in the instant case.

The Commission's construction of the parties' intent is thus "amply supported both factually and legally," *Gulf States Utilities Co.* v. *FPC,* 518 F.2d 450, 457 (D.C. Cir. 1975), *quoting, United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.,* 358 U.S. 103, 114 (1958). The Court of Appeals' determination that the Commission's construction of the contract was valid

should accordingly not be subject to review by this Court. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

II. There is no conflict with other Circuits.

As described above, the Fifth Circuit, in *Louisiana Power & Light Co.* v. *FERC,* 587 F.2d 671 (1979) reached a conclusion perfectly consistent with that of the Tenth Circuit in the instant case. Gallup seeks to create a conflict with the District of Columbia Circuit by relying on a number of decisions by that court. However, in two of the decisions cited by Gallup, *Papago Tribal Utility Authority v. FERC,* 610 F.2d 914 (1979) and *Oglesby v. FERC,* 610 F.2d 897 (1979), the court expressly stated that although it believed that the contract language in question pointed to a § 206 proceeding, it was not deciding, because it was not presented, whether "the rigorous *Sierra* burden of proof must be employed ..." *Papago Tribal Utility Authority* v. *FERC,* 610 F.2d at 930 n. 127; *Oglesby v. FERC,* 610 F.2d at 901 n.20.

As for the third case, *Richmond Power & Light Co.* v. *FPC,* 481 F.2d 490 (1973), as described above, that case clearly supports the decision of the Tenth Circuit that a contract providing for "a rate changeable in a specific manner" is entitled to protection. 481 F.2d at 497. Gallup's reliance on language taken from the second half of the *Richmond* case is entirely unwarranted.[8] It is readily apparent from the sentence immediately following the language quoted by Gallup, Petition at 13 n.8, that the court was not focusing on whether the parties had contracted for a § 206 change. Indeed, the court explicitly said that this was beside the point. The

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[8]The court treated two consolidated appeals in the opinion—one by Richmond Power & Light and the second by Anderson Power & Light.

question presented was whether the utility had the right, under § 205 and the Supreme Court's decision in *Memphis* to unilaterally change the rate.[9]

The subsequent history of the *Richmond* case is also instructive. On remand, the Commission stated that:

> We would note that the procedures under such a Section 206 proceeding would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions. As all parties concede, these contracts clearly contemplate that the Commission may order a change in rates; that is, the rates are not fixed for the term of the contract, only the manner in which such a change may be effected is contractually established. Accordingly, our examination of I&M's proposed rates would still be on a basis of our cost-plus-fair return standard. Cf: *Southern California Edison Company*, Docket No. E-8176, order issued September 21, 1973, 50 FPC 836.

Indiana & Michigan Elec. Co., 52 FPC 1752, 1755 n.11 (1974). Again, although the precise question of the burden of proof was not expressly presented to the court, when the D.C. Circuit reviewed the above order, the court broadly affirmed the Commission's interpretation of the contract and application of the *Sierra-Mobile* doctrine by stating that:

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[9]The Commission's decision in Carolina Power & Light Co., 47 FPC 1 (1972), also relied on by Gallup, Petition at 13 n.9, is inapposite for the identical reason. The portion of the opinion quoted by Gallup clearly discloses that the issue was whether the contractual language in question established that a unilateral rate increase was available.

> The Commission's reasoning is set forth in its opinion. It suffices to say that this is a matter in which the Commission has some latitude to interpret the contracts. Its 1974 opinion reflects a reasonable course in applying our *Richmond* opinion to the contracts of the cooperatives . . .

Indiana & Michigan Elec. Co. v. FPC, 530 F.2d 1060, 1062 (1976).

The issue was directly presented to the D.C. Circuit in *Marceline v. FERC*, No. 79-1740 (June 21, 1980). The Commission had held that the contract provided for a rate change after a § 206 proceeding and that the *Sierra* burden of proof did not apply. *Missouri Power & Light Co.*, No. ER76-539 (Opinion No. 31-A, May 16, 1979). PNM App. 7. Marceline argued to the Court of Appeals, *inter alia*, that the contract was a fixed rate contract. In an unpublished order, the D.C. Circuit affirmed without opinion.[10] PNM App. 9.

Finally, there is no conflict between the Tenth Circuit and the D.C. Circuit's decision in *Boroughs of Chambersburg v. FERC*, 580 F.2d 573 (1978). The court there was defining a fixed rate contract in contrast to the other extreme of a "going rate" contract as contemplated by this Court's decision in *Memphis*. Compare 580 F.2d at 574 n.2 with n.3. The *Chambersburg* court in no way sought to overrule the D.C. Circuit's previous decision in *Richmond* which drew the distinction between a rate changeable in a specific manner and a single fixed rate contract. 481 F.2d 490, 497. The *Chambersburg* case offers no support for Gallup's contention that the *Sierra* burden of proof applies to all

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[10]Although under that Court's rules, an unpublished order is without precedential effect, *Marceline* at the least establishes an absence of conflict with the D.C. Circuit.

contracts not unilaterally modifiable. Petition at 14. Indeed, *Kaukauna v. FERC,* 581 F.2d 993 (D.C. Cir. 1978), decided after *Chambersburg,* expressly reaffirmed *Richmond* that contracts which were changeable in a specific manner were not fixed rate contracts. *Id.* at 996.

Thus, the conflict among Circuits asserted by Gallup simply does not exist. To the contrary, as established immediately above and in I *supra,* the decisions of the Fifth and D.C. Circuits fully support the determination reached by the Tenth Circuit in the instant case.

CONCLUSION

For the foregoing reasons, Respondent PNM respecfully submits that the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

PAUL H. KECK
MICHAEL F. HEALY
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

Counsel for Public Service
Company of New Mexico

WILLIAM B. KELEHER
RICHARD B. COLE
Keleher & McLeod, P.A.
900 Public Service Building
Albuquerque, New Mexico 87103

APPENDIX

APPENDIX

ITEM: **PAGE**

1. *Public Service Co. of New Mexico,* Docket No. E-9454, Order Remanding Settlement For Hearing And Granting Motion for Hearing on Price Squeeze Issue And Establishing Procedures A-1

2. *Missouri Power & Light Co.,* Docket No. ER76-539, excerpts from Opinion No. 31-A, May 16, 1979 ..... A-7

3. *Marceline* v. *FERC,* No. 79-1740 (D.C. Cir., June 21, 1980) A-9

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Public Service Company of New Mexico	))	Docket No. E-9454

ORDER REMANDING SETTLEMENT FOR HEARING AND GRANTING MOTION FOR HEARING ON PRICE SQUEEZE ISSUE AND ESTABLISHING PROCEDURES

(Issued September 8, 1976)

On May 21, 1975, Public Service Company of New Mexico (PNM) tendered for filing a proposed rate schedule that would increase revenues from its jurisdictional customer, the City of Gallup, New Mexico (Gallup) by about $848,000. On June 30, 1975, Gallup filed a petition to intervene alleging, *inter alia*, that PNM's rate filing was non-competitive and discriminatory when considered in relation to its retail rates and when considered in relation to another wholesale customer, Community Public Service Co. (CPS).[1]

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[1]Gallup also objected that any rate increase filing is precluded by the contract terms and the *Sierra-Mobile* doctrine. PNM contended a unilateral price change is permissable under the contract. The Commission denied each of their contentions on July 31, 1975, and denied rehearing on September 26, 1975. Both appealed, *Public Service Co. of New Mexico, et al.* v. *F.P.C.*, 10th Cir., Nos. 75-1692, 76-1013.

By order of July 31, 1975, the Commission instituted an investigation under Section 206 of the Federal Power Act to determine a just and reasonable rate for PNM's service to Gallup. The order excluded consideration of the price squeeze issue pending Supreme Court review of *Conway Corporation* v. *F.P.C.*, 519 F.2d 1264 (1975), affirmed, 44 U.S.L.W. 4777 (June 7, 1976). On January 7, 1976, the Presiding Administrative Law Judge certified a proposed settlement of this matter to the Commission. This settlement is opposed by Gallup.

PNM's settlement proposal is based upon the cost of service study prepared by Gallup which Gallup served on all parties on November 4, 1975, for later submittal in evidence at the hearing. It meets the lowest cost of service study prepared by the parties and would permit an increase of $544,000 annually. Staff's cost of service study entered into the record would allow a $615,767 annual increase. PNM's filing showed a negative rate of return for the test year ended December 31, 1974, while the settlement rates indicated by Gallup's filing project a rate of return of 9.045%.[2]

Gallup objects to the settlement because it claims additional issues of fact remain to be resolved. Although the settlement would prescribe rates at the level of Gallup's served testimony, Gallup objects that it was unable on November 4, 1975 to serve a case on all issues of fact because PNM failed to supply data requested over one month earlier regarding Western Coal Company, partially owned by PNM.

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[2]PNM and the Commission Staff placed their evidence into the record at the prehearing conference. Gallup refused to do so on grounds that it has a right so withhold its case pending the closing of PNM's case.

Gallup has presented an offer of proof, prepared as testimony filed January 5, 1976, on the issue of fuel costs. It would purport to demonstrate that coal purchased by PNM from its 50% owned subsidiary, Western Coal Company, is more costly than coal purchased from nearby non-affiliated coal producers and that PNM's indicated return on its investment in 1974 was 57.1%. It also suggests that state regulatory agencies base just and reasonable rates for subsidiary prices on actual costs and not upon a comparison of prices. PNM has not rebutted Gallup's contentions concerning its indicated return on its investment in Western.

The Commission staff recommends approval of the settlement since the settlement rates are below Staff's recommendation and rejects Gallup's factual contentions. Staff points to the relatively low cost of Western's coal (26 cents per Mcf) versus the July, 1975, average nationwide cost of coal of 80.8 cents per MMBtu. Staff also says the PNM-Western coal contract appears to be cost based.

Gallup's offer of proof in the nature of prepared testimony raises questions not otherwise answered by the record. Gallup's offer of proof alleges that the coal contract in question does not base the rate for materials and supplies upon costs but upon wholesale price indices for commodity groups and claims there is an indicated return on PNM's investment in Western of 57.1%. Because factual issues concerning purchased fuel costs have been raised which are not resolvable by the record evidence, we will remand for the presentation of evidence directed to appropriateness of those costs.

We are unable to accept all of Gallup's factual allegations and still approve the settlement rates as just

and reasonable on this record. This situation renders inapplicable the cases cited by PNM which permit the approval of settlements over objection in certain cases.[5] Moreover, in another recent case, *Georgia Power Co.*, Opinion No. 711, [sic] to the settlement to be factually unsupported, it afforded that party an opportunity for cross-examination.

Gallup also objects that the settlement does not resolve the claimed discriminatory treatment of Gallup vis-a-vis CPS. Gallup says no basis exists for a lesser charge to CPS where CPS has a 47% greater entitlement to capacity than the peak load demand of Gallup during the 1974 test year and a further entitlement of 85% above that level within the first six months of 1975.

Staff and PNM respond that this issue should be rejected, noting PNM has filed in Docket No. ER76-308 proposed rate increases which, if approved, would result in a rate to CPS substantially higher than those proposed to Gallup based on 1974 costs.

We are today issuing an order approving the settlement at the proposed rates. This action moots this issue of discrimination raised by Gallup. We accordingly reject its request for hearing on this question.

In certifying this settlement to the Commission, the Presiding Administrative Law Judge recommended that the Commission approve the settlement and authorize the settlement rates to go into effect subject to refund and close the case subject to motion by Gallup to

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[5]PNM cites *Citizens for Allegan County, Inc.* v. *F.P.C.*, 414 F.2d 1125, 1128 (D.C. Cir. 1969); *Cities of Lexington, Ky.* v. *F.P.C.*, 295 F.2d 109, 121 (4th Cir. 1961); and *Pennsylvania Gas & Water Co.* v. *F.P.C.*, 463 F.2d 1242 (D.C. Cir. 1972).

remand on remaining issues. PNM and Staff support this recommendation while Gallup opposes it. We reject this recommendation.

As discussed above, Gallup has raised an issue that must be heard before the Commission acts pursuant to this Section 206 proceeding. We are not permitted by Section 206(a) of the Federal Power Act to authorize increased rates where both the contract between the parties prohibits unilateral filings and where we are unable to conclude the rates are just and reasonable. If the rates were permitted to become effective prior to finding them just and reasonable, it would be tantamount to permitting a unilateral filing. The impact of consideration of the coal fuel costs may demonstrate that the settlement rates are in excess of a just and reasonable rate. We therefore cannot accept the Judge's recommendation to place the settlement rates into effect subject to refund.

On July 6, 1976, Gallup filed a motion requesting that the Commission reopen the record in this proceeding so that the "price squeeze" issue can be considered. The motion is based on the Supreme Court's June 7, 1976 opinion affirming the Court of Appeals decision in *Conway, supra*. The Supreme Court in *Conway* held that the Commission has the jurisdiction to consider allegations that proposed wholesale rates are discriminatory and noncompetitive when considered in relation to the retail rates. This is known as the "price squeeze" issue. In view of the *Conway* Decision, the Commission has determined that it is necessary to permit Gallup to present evidence on the "price squeeze" issue in this reopened proceeding. The Commission has proposed the substantive standards it intends to apply in evaluating allegations of price squeeze in the Notice of Proposed Statement of Policy,

Policy Statement Concerning Electric Rate Schedule Filings and Requirement for Filing of Comparative Rate Information in Certain Situations, Docket No. RM76-29, issued July 29, 1976.

Accordingly, the Presiding Judge will be ordered to convene a conference to establish such further procedural dates as necessary. The settlement proposal will be rejected without prejudice to its further submission.

The Commission finds:

(1) Good cause exists to reject the settlement proposal and to reopen the record in accord with the provisions of this order.

(2) Good cause exists to grant Gallup's motion to reopen the record on the "price squeeze" issue.

The Commission orders:

(A) The Intervenors' Motion to reopen on the "price squeeze" issue is granted.

(B) Pursuant to the authority of the Federal Power Act, the Commission's Rules of Practice and Procedure, and the Regulations Under the Federal Power Act (18 CFR Chapter I), a prehearing conference shall be held at a date to be designated by the Presiding Administrative Law Judge, in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

(C) The Presiding Administrative Law Judge shall preside at the initial conference in this proceeding, with authority to establish and change all procedural dates, and to rule on all motions (with the exception of petitions to intervene, motions to consolidate and

sever, and motions to dismiss, as provided for in the Rules of Practice and Procedure).

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGUATORY COMMISSION

ELECTRIC RATES: Rehearing

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Missouri Power & Light Company) Docket No. ER76-539
)

OPINION NO. 31-A

OPINION AND ORDER ON REHEARING

(Issued May 16, 1979)

On November 24, 1978, the City of Marceline, Missouri (Marceline or City) field an application for rehearing of Opinion No. 31 which was issued on October 27, 1978 in this docket. By order issued December 26, 1978, the Commission granted rehearing for the limited purpose of further consideration. On reconsideration, we shall address issues concerning burden of proof, wage adjustments, price squeeze and

comprehensive interperiod tax allocation. Marceline's remaining contentions raise no new facts or legal arguments to warrant further discussion.

A. Burden of Proof

The City contends that "the Commission wrongfully adopted as the burden of proof for [this] hearing the just and reasonable standard of Section 206 of the Federal Power Act rather than the heavier burden of the *Mobile-Sierra*[1] standard." Marceline claims that the pertinent language in its contract with MP&L was misinterpreted by the Federal Power Commission (FPC) in its Order Granting Petition for Rehearing and Amending Prior Order issued June 4, 1976, in this proceeding. We disagree.

In its June 4 order, the FPC quoted from the contract which states:

> . . . that said rates may be changed during the term of the contract, but only with the approval of the appropriate regulatory agency having jurisdiction.

We continue to view this contract language as providing for a change in rates prospectively, that is, after the Commission has determined the just and reasonable rates in a Section 206 proceeding. We therefore affirm the Presiding Judge's decision, based on the June 4 order, to exclude testimony proffered by Marceline that would have been necessary under the *Mobile-Sierra* burden of proof.

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[1]*United Gas Pipeline* v. *Mobile Gas Service Corp.* 350 U.S. 332 (1956); *F.P.C.* v. *Sierra Pacific Power Co.* 350 U.S. 348 (1956). In order to raise the rate under the *Mobile-Sierra* standard, the Commission would have to find that the contract rate is so low as to adversely affect the public interest.

NOT TO BE PUBLISHED — SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 79-1740 September Term, 1979

City of Marceline, Missouri,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent,

Missouri Power & Light Company,

Intervenor.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUNE 21, 1980

GEORGE A. FISHER
CLERK

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: BAZELON, Senior Circuit Judge, TAMM and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Energy Regulatory Commission and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court.

See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order of the Federal Energy Regulatory Commission under review herein is hereby affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.